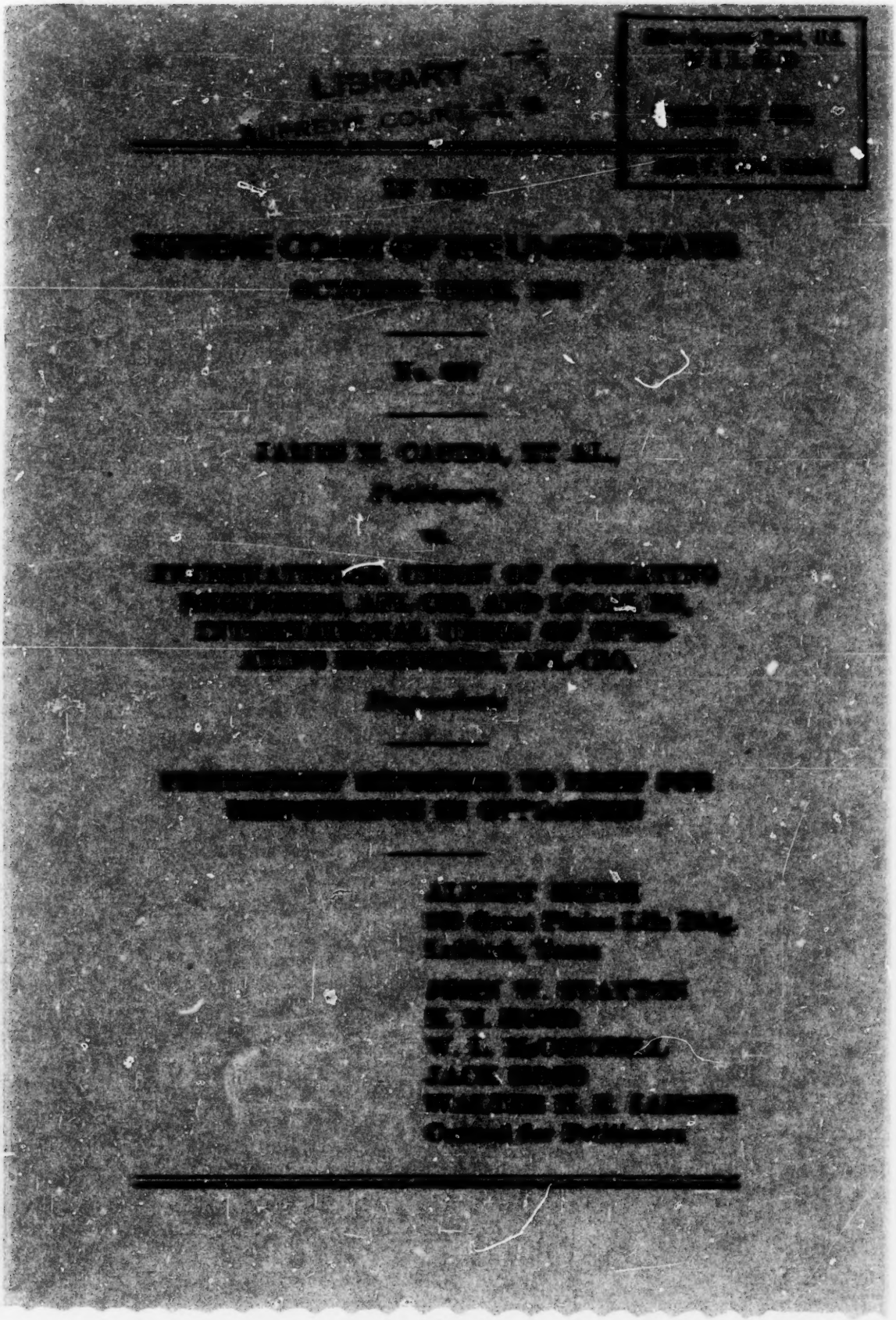

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 897

JAMES M. CASIDA, ET AL.,

Petitioners,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND LOCAL 351, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents

PETITIONERS' REJOINDER TO BRIEF FOR RESPONDENTS IN OPPOSITION

I.

This Cause Should Be Considered Along With No. 527, The Hanna Mining Co. vs. District 2, Etc.

No. 527, *The Hanna Mining Co. vs. District 2, etc.,* is a cause involving the same preemption question as is here involved. In No. 527, this Court has requested the Solicitor General to file a Memorandum for the

United States, and the Solicitor General has done so.

We respectfully suggest that the instant cause should be considered along with No. 527 since both causes involve preemption *and the effect to be given to action of the NLRB in refusing to issue a complaint.*

II.

The Primary Jurisdiction Rule Has Been Satisfied

Respondents argue that for two reasons the primary jurisdiction rule has not been satisfied. First they say the general counsel's refusal to issue a complaint because of "insufficient evidence of violation" is not a determination "that the activity was not protected by § 7 of the federal Act" in that "The area of insufficiency is not even suggested." Second, respondents argue that even if there be a finding that the activity was not "protected" such finding "cannot be equated with a finding that union coercion to keep employees from such activity is not violative of the federal Act." (Brief for Respondents, p. 12.)

Our reply is first that "the area of sufficiency is . . . suggested"; in fact the insufficiency is pinpointed. Admittedly petitioners were discharged by their employer because of petitioners' activity in shutting down the gasoline plants. Admittedly lawyers employed by the respondent unions sought to get petitioners reinstated to their jobs by filing with the NLRB a complaint against the employer. The refusal to issue the complaint can only be explained upon the ground that there was insufficient evidence that petitioners were engaged in "concerted activities" protected by Section 7 when they shut down the plants. If there be any other rational explanation of the general counsel's re-

fusal to issue a complaint, respondents have failed to suggest it.

Moreover a finding that petitioners were not engaged in "concerted activities" protected by Section 7 when they shut down the plants is necessarily a finding that petitioners' "right to refrain from any or all of such activities" was not infringed by respondent unions. If the employer did not violate the act by discharging petitioners in that petitioners were not engaged in "concerted activities" protected by Section 7 when they shut the plants down, the respondent unions did not violate the act by depriving petitioners of the "right to refrain from any and all of such activities" by inducing petitioners to shut the plants down.

Suppose for sake of argument that complaints against both the employer and the respondent unions had been filed with the NLRB. Could the Board have found at one and the same time that the employer did *not* violate the act by discharging petitioners in that petitioners were not engaged in "concerted activities" protected by Section 7, when they shut the plants down, and that the respondent unions *did* violate the act by depriving petitioners of their "right to refrain from any or all of such activities," that is "concerted activities" protected by Section 7?

We respectfully call the Court's attention to the following quotation from the Memorandum for the United States filed by the Solicitor General in No. 527, *The Hanna Mining Co. v. District 2, etc.*:

> "If the General Counsel finds reasonable cause to believe that an unfair labor practice has been committed, he will issue a complaint and the matter will ultimately go before the Board for decision If, on the other hand, he finds no reason to

believe that an unfair labor practice has been committed, he will decline to issue a complaint and the matter will never reach the Board. In the usual case, the General Counsel's refusal to issue a complaint does not 'define the nature of the activity with unclouded legal significance' (*Garmon*, 359 U.S. at 246), and hence does not permit the States to step in.

"The Act, for example, prohibits peaceful picketing when it is conducted for the secondary objectives proscribed by Section 8(b)(4)(B), and limits picketing, even though it is directed only at the primary employer, when it is conducted for recognitional or organizational purposes (Section 8(b)(7)). In general, peaceful picketing otherwise falls either within the specific protection of Section 7 of the Act or within the area which Congress has designedly left to the free play of economic forces. In these circumstances, it is apparent that, should the General Counsel refuse to issue a complaint on charges alleging picketing was being conducted in violation of Section 8(b)(4)(B) or Section 8(b)(7), this would normally not be sufficient to establish that the activity was removed from the preemptive effect of the Act. Such refusal would merely indicate that there was insufficient evidence to bring the picketing within one of the Act's prohibitory bans; *it would not negate the possibility that the picketing was affirmatively protected by Section 7 or designedly left free.*" (Memorandum, pp. 7-8; our emphasis.)

Here the general counsel's refusal to issue a complaint *did* "define the nature of the activities with unclouded legal significance." Here the refusal to issue the complaint can only be explained upon the ground that there was "insufficient evidence" that the petitioners were engaged in "concerted activities" protected by Section 7 when they shut down the gasoline plants; and if there was insufficient evidence that pe-

titioners were engaged in "concerted activities" protected by Section 7, necessarily there was insufficient evidence that respondent unions deprived petitioners of "the right to refrain from any or all of such activities," that is "concerted activities" protected by Section 7 when respondent unions induced petitioners to shut down the gasoline plants.

Section 3(d) of the Labor Management Relations Act, as amended (29 U.S.C., § 153(d)), provides that there "shall be a General Counsel of the Board who . . . shall have final authority, *on behalf of the Board,* in respect of the investigation of charges and issuance of complaints. . . ." (Our emphasis.) Certainly, the determination of the general counsel that there is insufficient evidence of a violation of the Act should be given effect. This is especially so since his decision is final insofar as the Board is concerned and insofar as the courts are concerned. (*Hourihan v. NLRB* (C.A., D.C.), 201 Fed. 2d 187.)

III.

Since the Activity Was Neither "Protected" Nor "Prohibited" It Was Not Preempted

Respondents argue that even though the activity here involved was neither protected nor prohibited by federal law, nevertheless "it is still removed from state jurisdiction since it lies squarely within the 'area of conduct' as to which the Congress legislated." (Brief for Respondents, p. 14.) Respondents cite *Teamsters Local 20 vs. Morton,* 377 U.S. 252, 12 L. Ed. 2d 280, 285, in support of this proposition.

The case cited was one in which the employer obtained a money judgment against the union that rep-

resented its employees for damages resulting from activities during a strike. But here the money judgment against respondent unions was awarded petitioners, one time union members, because of "internal union matters," that is, because of the breach by the respondent unions of their implied contract to advise petitioners of their rights and duties and to refrain from making false representations to petitioners to induce them to engage in activities that resulted in their discharge and in the ruin of their careers.

Moreover, as is plainly shown at pages 20-22 of the Petition, the "internal union matters" here involved do not have "to do directly with matters of employment." Clearly, therefore, the instant case is concerned with matters that Congress has left to regulation by the States.

Respondents argue that "the right to strike is not exercised in a vacuum" and that each "particular order," *etc.*, "must be governed exclusively by the Federal Act." (Brief for Respondents, p. 15.) But this is nothing more nor less than the contention that jurisdiction of "internal union matters" has not been left to the State. A union might without cause expel members immediately prior to a strike because of its belief that such members would elect to refrain from engaging in concerted activities protected by Section 7, and that such course of conduct would weaken the strike. But this would not mean that the State would have no jurisdiction in the premises. Merely because "internal union matters" may have some relationship to a strike, does not deprive the States of their jurisdiction. To employ language quoted from *Borden* (373 U.S. 690), what "national policy" is hampered by allowing the State courts to award damages to the petitioners be-

cause of the breach by the respondent unions of their implied contract with the petitioners in an instance where such breach has nothing whatsoever to do with "concerted activities" either "protected" or "prohibited" by the federal act?

IV.

Implied Covenant

The trial court held that the respondents were under an implied contractual obligation to advise the petitioners of their rights and duties when striking. On the jury finding that the respondents breached that duty, the trial court entered a judgment for petitioners (28 Men's Brief, pp. 178-179 and 146-149). The Court of Civil Appeals and the Supreme Court of Texas ignored the implied contract obligation theory of petitioners' recovery.

This Court held in *Humphrey vs. Moore,* 11 L. Ed. 2d 370 that the State and Federal Courts have jurisdiction to decide questions based upon a contractual obligation even though they may also arguably involve an unfair labor practice:

> ". . . Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, Smith vs. Evening News Association, supra, subject of course, to the applicable federal law." (11 L. Ed. 2d 378-9.)

There, as here, the union members also alleged fraud, deceit and conspiracy. In the present case, respondents' business agent and vice-president testified that when petitioners joined the respondent union they became entitled to be informed "as to what their rights and duties (were) connected with carrying out a strike." (3 S.F. 137.)

The pleadings, the evidence, and the jury findings support the judgment based on the breach of an implied contractual obligation. (28 Men's Brief, pp. 146-149 and 178-179.)

V.

Petitioners Have Not Gone Outside the Record

Respondents make the captious argument that the documentary evidence reflecting the refusal of the general counsel to issue a complaint to consider the charge that the employer had violated the Act in discharging petitioners because of their action in shutting down the gasoline plants is outside the record. In this respondents are wholly mistaken. The documentary evidence about which there is no dispute is *in* the record. The documents were not admitted in evidence *before the jury* for obvious reasons, but this in no way detracts from the fact that they are part of the record before this Court.

VI.

Petitioners' Argument Is Not "New"

Here, again, respondents seek to cloud the record by leaving the impression that the point of error made by petitioners and supported by argument has not been properly preserved.

As clearly shown in the Petition, pp. 8-9, the facts

are that petitioners have contended, ever since the Texas Court of Civil Appeals held that the state courts have no jurisdiction because of the preemption rule, that such holding is erroneous. All but one of the points of error presented in the Application for Writ of Error to the Supreme Court of Texas presented this contention. The argument that respondents contend is "new" is merely additional argument in support of the proposition, properly presented in the points of error, that the preemption rule is inapplicable and that the state courts do have jurisdiction.

Under Texas practice, all that is required to preserve the right to make any and all argument is to present a point of error to which the argument may be directed. It is not necessary that the point of error refer to the argument that will be made in support of it; in fact, it is better practice to present a purely non-argumentative point of error. But, once the point of error is properly presented and preserved, any and all argument in support of it can be presented in any court.

In connection with the foregoing we call attention to the fact that Rule 469 of the Texas Rules of Civil Procedure provides that "The points of error relied on, separately numbered, shall be stated in short form *and without argument* . . ." The Supreme Court of Texas has held that "So much of an assignment as is argumentative is unnecessary, and, as we think, improper." (*Hodo v. Mexican National Ry. Co.*, 88 Tex. 523, 524, 32 S.W. 511.)

Respectfully submitted,

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Proof of Service

I, Albert Smith, one of the attorneys for James M. Casida, et al., petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of March, 1965, I served copies of the foregoing Rejoinder to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas on the several parties thereto as follows:

(1) On International Union of Operating Engineers, AFL-CIO, a respondent herein, by mailing a copy in a duly addressed envelope with postage prepaid to Mullinax, Wells, Morris & Mauzy, 1601 National Bankers Life Building, Dallas 1, Texas, and to Woll, Mayer & St. Antoine, 736 Bowen Building, Washington 5, D.C.

(2) On Local 351, International Union of Operating Engineers, AFL-CIO, the other respondent herein, by mailing a copy in a duly addressed envelope with postage prepaid to Arthur Mitchell, 400 First Federal Savings Building, 11th and San Jacinto Streets, Austin, Texas, and to Sam Houston Clinton, Jr., 205 May Building, 308 West 11th Street, Austin, Texas.

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